

**NO. 45013-5**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PATRICK JOSEPH MULLEN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 13-1-01340-3

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**BRIEF OF RESPONDENT**

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MARK LINDQUIST  
Prosecuting Attorney

By  
JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

## Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u> .....	1
1.	Does the invited error doctrine bar defendant's claim that the court lacked authority to decide whether his reckless driving conviction qualified as a prior offense under the DUI statute since defendant presented that issue to the court as a matter of law for the court? .....	1
2.	Has defendant waived his <i>Blakely</i> challenge to the pretrial ruling on the admissibility of his reckless driving conviction due to his failure to present that untimely raised claim in a motion for reconsideration beofre the appropriate court? .....	1
3.	Did the court act within its authority when it accurately decided defendant's reckless driving conviction qualified as prior DUI offense under RCW 46.61.5055 as a threshold matter of law? .....	1
4.	Is defendant incapable of proving a confrontation clause violation since he received the constitutionally required opportunity to cross-examine the State's witnesses at trial? .....	1
5.	Has defendant failed to prove the State's accurate characterization of the reasonable doubt standard in rebuttal was flagrant and ill-intentioned misconduct that prejudiced his case? .....	2
B.	<u>STATEMENT OF THE CASE</u> .....	2
1.	Procedure .....	2
2.	Facts.....	5

C.	<u>ARGUMENT</u> .....	6
1.	THE INVITED ERROR DOCTRINE BARS DEFENDANT'S CLAIM THE COURT LACKED AUTHORITY TO DECIDE WHETHER HIS RECKLESS DRIVING CONVICTION QUALIFIED AS A PRIOR DUI BECAUSE DEFENDANT PRESENTED THAT ISSUE TO THE COURT AS A MATTER OF LAW FOR THE COURT.....	6
2.	DEFENDANT ALSO WAIVED HIS <b>BLAKELY</b> CHALLENGE TO THE PRETRIAL RULING WHEN HE FAILED TO PRESENT IT TO JUDGE McCARTHY IN A MOTION FOR RECONSIDERATION.....	7
3.	THE COURT ACTED WITHIN ITS AUTHORITY WHEN IT ACCURATELY DECIDED DEFENDANT'S RECKLESS DRIVING CONVICTION QUALIFIED AS A PRIOR DUI OFFENSE UNDER RCW 46.61.5055. ....	9
4.	DEFENDANT IS INCAPABLE OF PROVING A CONFRONTATION CLAUSE VIOLATION BECAUSE HE RECEIVED THE CONSTITUTIONALLY REQUIRED OPPORTUNITY TO CROSS-EXAMINE THE STATE'S WITNESSES AT TRIAL. ....	19
5.	DEFENDANT FAILED TO PROVE THE STATE'S ACCURATE CHARACTERIZATION OF THE REASONABLE DOUBT STANDARD IN REBUTTAL WAS FLAGRANT AND ILL-INTENTIONED MISCONDUCT THAT PREJUDICED HIS CASE. ....	28
D.	<u>CONCLUSION</u> . ....	38

## Table of Authorities

### State Cases

<i>Bremerton v. Tucker</i> , 126 Wn. App. 26, 30, 103 P.3d 1285 (2005) .....	13
<i>City of Richland v. Michel</i> , 89 Wn. App. 764, 770-72, 950 P.2d 10 (1998) .....	13
<i>City of Walla Walla v. Greene</i> , 154 Wn.2d 722, 728, 116 P.3d 1008(2005) .....	7, 10, 11, 12, 13, 14, 15, 16, 17, 19
<i>City of Yakima v. Skov</i> , 129 Wn. App. 91, 93, 118 P.3d 366 (2005) .....	13
<i>Crawford v. Washington</i> , 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	20, 23
<i>In re Detention of Fair</i> , 167 Wn.2d 357, 362, 219 P.3d 89 (2009).....	11
<i>Moen v. Chestnut</i> , 9 Wn.2d 93, 108, 113 P.2d 1030 (1941) .....	24
<i>Saviano v. Westport Amusements</i> , 144 Wn. App. 72, 84, 180 P.3d 874 (2008) .....	7, 8
<i>State v. Ager</i> , 128 Wn.2d 85, 93, 904 P.2d 546 (1997).....	18
<i>State v. Athan</i> , 160 Wn.2d 354, 386, 158 P.3d 27 (2007) .....	23, 24
<i>State v. Boast</i> , 87 Wn.2d 447, 453, 553 P.2d 1322 (1976) .....	21
<i>State v. Boss</i> , 167 Wn.2d 710,718-19, 223 P.3d 506 (2009) .....	10, 13
<i>State v. Boyer</i> , 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979) .....	7
<i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995) .....	28
<i>State v. Brown</i> , 132 Wn.2d 529, 605, 940 P.2d 546 (1997) .....	18
<i>State v. Burgess</i> , 43 Wn. App. 253, 266, 716 P.2d 948 (1986) .....	14
<i>State v. Carmen</i> , 118 Wn. App. 655, 77 P.3d 368 (2003) .....	10, 11
<i>State v. Carson</i> , ____ Wn. App. ____, ____ P.3d ____ (2014 WL 982364) .....	6, 9

<i>State v. Castle</i> , 156 Wn. App. 539, 542, 234 P.3d 260 (2010) .....	10
<i>State v. Cervantes</i> , 169 Wn. App. 428, 434, 282 P.3d 98 (2012) .....	16
<i>State v. Chambers</i> , 157 Wn. App. 465, 475, 237 P.3d 352 (2010) .....	7, 8, 10, 11, 12, 13, 14, 15, 19
<i>State v. Chandler</i> , 158 Wn. App. 1, 5-6, 240 P.3d 159 (2010).....	15, 16, 26
<i>State v. Cochrane</i> , 160 Wn. App. 18, 25, 253 P.3d 95 (2011) .....	12, 13, 19
<i>State v. Darden</i> , 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) .....	13
<i>State v. Dennison</i> , 72 Wn.2d 842, 849, 435 P.2d 526 (1967) .....	29
<i>State v. Dobbs</i> , ___ Wn.2d ___, ___ P.3d ___ (2014 WL 980102).....	13, 17
<i>State v. Emery</i> , 174 Wn.2d 741, 761, 278 P.3d 653 (2012).....	35
<i>State v. Emmanuel</i> , 42 Wn.2d 799, 820, 259 P.2d 845 (1953) .....	9
<i>State v. Fortun-Cebada</i> , 158 Wn. App. 158, 172-73, 241 P.3d 800 (2010) .....	15
<i>State v. Furman</i> , 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).....	28
<i>State v. Graham</i> , 59 Wn. App. 418, 428, 798 P.2d 314 (1990).....	28
<i>State v. Gray</i> , 134 Wn. App. 547, 549-50, 138 P.3d 1123 (2006) .....	10
<i>State v. Green</i> , 46 Wn. App. 92, 96, 730 P.2d 1350 (1986) .....	28
<i>State v. Guloy</i> , 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).....	21
<i>State v. Hathaway</i> , 161 Wn. App. 634, 647, 251 P.3d 253, <i>review denied</i> , 172 Wn.2d 1021 (2011).....	18
<i>State v. Heib</i> , 107 Wn.2d 97, 105-06, 727 P.2d 239 (1986) .....	21
<i>State v. Henderson</i> , 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990).....	7
<i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991) .....	28
<i>State v. Hurtado</i> , 173 Wn. App. 592, 597-98, 294 P.3d 838 (2013) .....	24

<i>State v. Jasper</i> , 174 Wn.2d 96, 109, 271 P.3d 876 (2012) .....	19, 20, 24, 25, 26, 27
<i>State v. Johnson</i> , 124 Wn.2d 57, 77, 873 P.2d 514 (1994) .....	27
<i>State v. Jones</i> , 26 Wn.App. 551, 553, 614 P.2d 190 (1980) .....	14
<i>State v. Kinard</i> , 39 Wn. App. 871, 873, 696 P.2d 603, <i>review denied</i> , 103 Wn.2d 1041 (1985) .....	8
<i>State v. Kirkman</i> , 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007) .....	8
<i>State v. Kirkpatrick</i> , 160 Wn.2d 873, 161 P.3d 990 (2007) .....	20, 26
<i>State v. Kronich</i> , 160 Wn.2d 893, 161 P.3d 982 (2007) .....	20, 26
<i>State v. Labbee</i> , 134 Wn.2d 55, 60-61, 234 P. 1049 (1925) .....	23, 24
<i>State v. Lui</i> , 179 Wn.2d 457, 527, 315 P.3d 493 (2014) .....	21, 24, 25, 26, 27
<i>State v. Mason</i> , 160 Wn.2d 910, 921-923, 162 P.3d 396 (2007) .....	23, 24
<i>State v. McChristian</i> , 158 Wn. App. 392, 400, 241 P.3d 468 (2010) .....	28, 36
<i>State v. Miller</i> , 156 Wn.2d 23, 31, 123 P.3d 827(2005) .....	8, 9, 10, 11, 13, 14, 16
<i>State v. Mills</i> , 80 Wn. App. 231, 234, 907 P.2d 316 (1995) .....	7, 8
<i>State v. O'Cain</i> , 169 Wn. App. 228, 255-58, 279 P.3d 926 (2012) .....	23
<i>State v. Picard</i> , 90, Wn. App. 890, 902, 954 P.2d 336 (1998) .....	18
<i>State v. Powell</i> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995) .....	13, 17
<i>State v. Pugh</i> , 167 Wn.2d 825, 836, 225 P.3d 892 (2009) .....	23, 24
<i>State v. R.G.P.</i> , 175 Wn. App. 131, 136, 302 P.3d 885 (2013) .....	11
<i>State v. Reed</i> , 102 Wn.2d 140, 145, 684 P.2d 699 (1984) .....	28, 36

<i>State v. Rice</i> , 110 Wn.2d 577, 603, 757 P.2d 889 (1988), <i>cert. denied</i> , 491 U.S. 910 (1989) .....	18
<i>State v. Rice</i> , 110 Wn.2d 577, 603, 757 P.2d 889 (1988), <i>cert. denied</i> , 491 U.S. 910 (1989), <i>cert. denied</i> , 523 U.S. 1007 (1998).....	18
<i>State v. Robinson</i> , 171 Wn.2d 292, 304, 253 P.3d 84 (2011).....	8
<i>State v. Roswell</i> , 165 Wn.2d 186, 192, 196 P.3d 705 (2008).....	9
<i>State v. Rupe</i> , 101 Wn.2d 664, 708, 683 P.2d 571 (1984).....	13
<i>State v. Russell</i> , 125 Wn.2d 24, 86, 882 P.2d 747 (1994).....	28, 29
<i>State v. Schroeder</i> , 164 Wn. App. 164, 167-68, 262 P.3d 1237 (2011) ...	21
<i>State v. Smith</i> , 124 Wn. App. 417, 428, 102 P.3d 158 (2004).....	18
<i>State v. Smith</i> , 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) .....	37
<i>State v. Stenson</i> , 132 Wn.2d 668, 730, 940 P.2d 12 39 (1997) .....	37
<i>State v. Studd</i> , 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999).....	6-7
<i>State v. Thomas</i> , 150 Wn.2d 821, 874, 83 P.3d 970 (2004) .....	13
<i>State v. Warren</i> , 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008) .....	28, 31, 32, 34, 35, 36, 37
<i>State v. Wicke</i> , 91 Wn.2d 638, 642, 591 P.2d 452 (1979) .....	8
<i>State v. Williams</i> , 162 Wn.2d 177, 183, 170 P.3d 30 (2007).....	10
<i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007).....	36, 37

## **Federal and Other Jurisdictions**

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 490, 120 S. Ct. 2348 (2000).....	9
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	1, 7, 8, 9, 11, 12, 13, 17

<i>Crawford v. Washington</i> , 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	20, 23
<i>Bullcoming v. New Mexico</i> , ___ U.S. ___, 131 S. Ct. 2705, 2713, 180 L. Ed. 2d 610 (2011).....	26
<i>California v. Green</i> , 399 U.S. 149, 155-56, 90 S. Ct.1930, 1933-34, 26 L. Ed. 2d 489 (1970) .....	21
<i>Davis v. Washington</i> , 547 U.S. 813, 827, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....	24
<i>Eslaminia v. White</i> , 136 F.3d. 1234, 1237 (9th Cir. 1998).....	24, 27
<i>In re Winship</i> , 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	9
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).....	20, 21, 25, 26
<i>United States v. Cromer</i> , 389 F.3d 662, 675-76 (6th Cir. 2004) .....	23
<i>United States v. Descamps</i> , ___ U.S. ___, 133 S. Ct. 2276, 2282-83, 186 L. Ed. 2d 438 (2013).....	17

## **Constitutional Provisions**

Sixth Amendment, United States Constitution.....	11, 15, 19
Fourteenth Amendment, United States Constitution.....	11

## **Statutes**

18 U.S.C. § 924(e) .....	17
RCW 46.61 .....	9
RCW 46.61.500 .....	10
RCW 46.61.502 .....	2, 10, 19
RCW 46.61.502(6)(a) .....	9, 10

RCW 46.61.5055 .....	1, 9
RCW 46.61.5055(14) .....	19
RCW 46.61.5055(14)(a) .....	2, 17, 19
RCW 46.61.5055(14)(a)(v) .....	10, 11, 14, 15
RCW 46.61.602 .....	1
RCW 46.61.602(6)(a) .....	14
RCW 9.92.020 .....	9
RCW 9A.20.021(1)(c) .....	9

## **Rules and Regulations**

CrR 3.5 .....	14
CrR 3.6 .....	14
ER 103 .....	8
ER 104 .....	12, 14, 15, 17
ER 1101(1) .....	14
ER 1101(3) .....	14
ER 401 .....	13
ER 402 .....	13
ER 609 .....	14
ER 702 .....	14
ER 801(d)(2) .....	14
ER 803-4 .....	14
ER 902(d) .....	15

RAP 10.3 .....7, 8

RAP 2.5(a).....7, 16

**Other Authorities**

Webster's Third New International Dictionary 1126 (2002).....35, 36

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the invited error doctrine bar defendant's claim that the court lacked authority to decide whether his reckless driving conviction qualified as a prior offense under the DUI<sup>1</sup> statute since defendant presented that issue to the court as a matter of law for the court?
2. Has defendant waived his *Blakely*<sup>2</sup> challenge to the pretrial ruling on the admissibility of his reckless driving conviction due to his failure to present that untimely raised claim in a motion for reconsideration before the appropriate court?
3. Did the court act within its authority when it accurately decided defendant's reckless driving conviction qualified as prior DUI offense under RCW 46.61.5055 as a threshold matter of law?
4. Is defendant incapable of proving a confrontation clause violation since he received the constitutionally required opportunity to cross-examine the State's witnesses at trial?

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<sup>1</sup> Driving While Under the Influence ("DUI"). RCW 46.61.602, 5055.

<sup>2</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).

5. Has defendant failed to prove the State's accurate characterization of the reasonable doubt standard in rebuttal was flagrant and ill-intentioned misconduct that prejudiced his case?

B. STATEMENT OF THE CASE.

1. Procedure

Appellate, Patrick Mullen ("defendant"), was charged with felony driving under the influence (Count I) and driving while license suspended in the second degree (Count II). CP 1-3; 2RP 4.<sup>3</sup> The Honorable John A. McCarthy denied defendant's pretrial motion to exclude his Chelan County reckless driving conviction<sup>4</sup> by ruling it qualified for admissibility as a prior offense under the felony DUI statute.<sup>5</sup> 1RP 3, 11-12; CP 6-9, 36. Defendant did not challenge Judge McCarthy's authority to decide that issue as defendant presented it as a threshold matter of law to be decided by the court, contrary to his position on appeal. 1RP 3-5, 9-11; CP 6-9.

The Honorable Katherine Stolz presided over defendant's trial. 2RP 4. Defendant attempted to relitigate Judge McCarthy's ruling. *See e.g., Id.* at 9. Defendant eventually augmented his pretrial motion to

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<sup>3</sup> The State will refer to the four volume VRP as designated by defendant, *i.e.*: June 10, 2013 ("1RP"); June 11-13, 2013 ("2RP"); June 12, 2013 ("3RP"); June 13-14, 17, 19 ("4RP").

<sup>4</sup> Admitted at trial as Exhibit No. 6 and referred to during motions in limine as Exhibit No. 2. *See* 2RP 17.

<sup>5</sup> Driving Under the Influence ("DUI") RCW 46.61.502; 46.61.5055(14)(a).

exclude the Chelan conviction by arguing in the alternative that its qualification as a prior offense was a question of fact to be decided by the jury beyond a reasonable doubt. 2RP 60-61, 63-67. Judge Stolz would not modify Judge McCarthy's legal ruling and restricted defendant to arguing against the factual proof of the prior offense's existence. *Id.* 10-14, 20-21, 25, 67-69. Judge Stolz intimated she would abide by Judge McCarthy's ruling on a motion for reconsideration should defendant elect to file one. *Id.* Defendant did not pursue that avenue of relief.<sup>6</sup>

The State called defendant's arresting officer, Trooper Cliff Roberts, and Department of Licensing ("DOL") records custodian Joseph Templeton at trial. 2RP 79; 4RP 42-3. Defendant interposed two hearsay objections to Roberts' testimony about the result of the records check performed during the DUI investigation. 2RP 99; 4RP 14-15. Defendant did not argue that testimony violated the confrontation clause. *Id.*

Defendant did make a confrontation clause objection to DOL records custodian Templeton's testimony from a certified copy of defendant's driving record ("CCDR"). 4RP 49-52, Ex.9. Templeton was permitted to testify from his personal knowledge about the CCDR, which was admitted as Exhibit No.9 under the business record exception over

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<sup>6</sup> The State assumes a motion for reconsideration was not pursued from the record presented for review and defendant's appeal.

defendant's objection. 4RP 52, 54. Defendant subjected Templeton's testimony to cross examination. 4RP 63-79, 91-2.

Objections to proposed jury instructions were addressed on the record. 4RP 101. The court gave the State's definition of "prior offense" over defendant's objection and proposed instruction, which invited the jury to decide whether his reckless driving conviction legally qualified as a prior offense. 4RP 101-106; CP 77 (Def. No.1); CP 50 (State's proposed); CP 100 (Court's Instruction No. 9).

During summation defense counsel improperly compared the State of Washington's case against defendant to the publicly criticized federal surveillance of private internet activity and argued defendant is "entitled to the benefit of the doubt...." 4RP 133. The State responded in rebuttal by reminding the jury that the standard is "reasonable doubt." 4RP 146. Defendant did not object. *Id.* He moved for mistrial based on prosecutorial misconduct once the jury retired. 4RP 150-51. The motion was denied and error is not assigned to that ruling. 4RP 152.

Defendant was convicted as charged. 4RP 157; CP 86, 88. He was sentenced to 29 months on Count I and received a 364 day suspended sentence on Count II. 4RP 168. His notice of appeal was timely filed. 4RP 172; CP 135.

## 2. Facts

911 callers reported a possible DUI driver traveling southbound on I-5 in a gray GMC truck. 2RP 87-88. Trooper Roberts observed defendant drive that truck between its lane and the right shoulder before drifting left to occupy two lanes. 2RP 89, 91. Roberts activated his emergency lights. 2RP 90. Defendant engaged his right signal, swerved to the right shoulder then weaved side to side down the shoulder at 60 miles per hour. 2RP 89-90. Defendant swerved back into his original lane, briefly crossed into the lane to his left, returned to his original lane and continued to weave before exiting onto SR 16. 2RP 90. Roberts activated a siren. RP 90. Defendant nearly stopped in his lane, but eventually pulled over to the shoulder. 2RP 90-91.

Defendant was extremely intoxicated. 2RP 96. A strong odor of liquor emanated from his truck. 2RP 91. He had bloodshot-watery eyes, a flushed face, extremely droopy eyelids, and unintelligibly slurred speech when he first attempted to talk. 2RP 91-93. He moved lethargically without dexterity. 2RP 92. Roberts observed a beer in the center console as defendant unsuccessfully rummaged through it to find his license and proof of insurance. 2RP 92-94.

Roberts noticed a strong order of urine, then observed a corresponding wet spot on the crotch of defendant's pants as he stumbled

out of the truck before falling backward and picking up a sway as he endeavored to stand. 2RP 94-95. His difficulty remaining upright made it unsafe for him to perform mobility based sobriety tests. 2RP 96. A horizontal gaze nystagmus test of defendant's eyes indicated impairment. *Id.* Defendant ultimately admitted his ability to drive was compromised by alcohol consumption. 4RP 16-17. After an initial refusal, he submitted a sample of his breath that contained an alcohol concentration between .319 and .322. 2RP 108-10; 4RP 14. Defendant's license was revoked in the second degree at the time of his arrest, and he had four prior DUI offenses within ten years. 2RP 98-99, 113-120; 4RP 15, 45-49, 55-62, 82-90; CP 145-46, Ex.4-6, 8-9.

C. ARGUMENT.

1. THE INVITED ERROR DOCTRINE BARS DEFENDANT'S CLAIM THE COURT LACKED AUTHORITY TO DECIDE WHETHER HIS RECKLESS DRIVING CONVICTION QUALIFIED AS A PRIOR DUI BECAUSE DEFENDANT PRESENTED THAT ISSUE TO THE COURT AS A MATTER OF LAW FOR THE COURT.

"The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights." *State v. Carson*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2014 WL 982364) (citing *State v. Studd*,

137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990); *State v. Boyer*, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)).

If it was error for Judge McCarthy to decide whether the reckless driving conviction qualified as a prior offense, it was an error defendant helped create when he motioned Judge McCarthy to rule on that issue as a matter of law. 1RP3-5, 9-12; CP 6-9 (*citing City of Walla Walla v. Greene*, 154 Wn.2d 722, 728, 116 P.3d 1008(2005); *State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010)), 36. The invited error doctrine should preclude defendant from appealing the appropriateness of Judge McCarthy making a ruling on an issue defendant asked him to decide.<sup>7</sup>

2. DEFENDANT ALSO WAIVED HIS **BLAKELY** CHALLENGE TO THE PRETRIAL RULING WHEN HE FAILED TO PRESENT IT TO JUDGE MCCARTHY IN A MOTION FOR RECONSIDERATION.

Failure to timely raise an issue is generally treated as waiver on appeal absent manifest error affecting a constitutional right. RAP 2.5(a);

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<sup>7</sup> The trial court abided by Judge McCarthy's ruling, and deferred any modification of that ruling to Judge McCarthy's discretion.<sup>7</sup> 2RP 10-14, 20-21, 25, 67-69; CP 36. No error has been assigned to that decision. *Saviano v. Westport Amusements*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008) (Appellate courts "do not address issues that a party neither raises nor discusses meaningfully with citations to authority") (*citing* RAP 10.3; *State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1995)).

ER 103; *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011); *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007); *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979).

Defendant challenges Judge McCarthy's pretrial ruling pursuant to *Blakely*, but he never gave Judge McCarthy an opportunity to consider that ruling under *Blakely*. 1RP 3-5, 9-12. The issue was not preserved when defendant raised it before Judge Stolz as she deferred reconsideration to Judge McCarthy and defendant did not pursue the *Blakely* claim before him. 2RP 10-14, 20-21, 25, 67-69. It was within Judge Stolz discretion to refer the matter to the issuing judge and error is not assigned to her exercise of that discretion. *See e.g., State v. Kinard*, 39 Wn. App. 871, 873, 696 P.2d 603, *review denied*, 103 Wn.2d 1041 (1985); *Saviano*, 144 Wn. App. at 84 (*citing* RAP 10.3; *Mills*, 80 Wn. App. 234). It was not manifest constitutional error for Judge McCarthy to decide the challenged conviction's qualification as a prior offense under the DUI statute. *See Chambers*, 157 Wn. App. at 467, 477 (*citing e.g., State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827(2005)). So defendant waived his *Blakely* issue when he failed to raise it in the appropriate forum below.

3. THE COURT ACTED WITHIN ITS AUTHORITY  
WHEN IT ACCURATELY DECIDED  
DEFENDANT'S RECKLESS DRIVING  
CONVICTION QUALIFIED AS A PRIOR DUI  
OFFENSE UNDER RCW 46.61.5055.

The legislature may define the elements of a crime when it enacts a criminal statute. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Those elements must be submitted to a jury<sup>8</sup> and proved beyond a reasonable doubt. *Id.* (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348 (2000))).

DUI's relevant statutory elements require the State to prove defendant drove a vehicle under the influence of intoxicating liquor. RCW 46.61. 602; *Miller*, 156 Wn.2d at 27 (citing *Cf. State v. Emmanuel*, 42 Wn.2d 799, 820, 259 P.2d 845 (1953)). The crime is elevated from a misdemeanor<sup>9</sup> to a class C felony<sup>10</sup> if "[t]he [defendant] has four or more prior offenses within ten years as defined in RCW 46.61.5055...." RCW

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<sup>8</sup> Absent a knowing, voluntary, and intelligent waiver. *See State v. Carson*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2014 WL 982364).

<sup>9</sup> RCW 9A.20.020 "Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute ... shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days...."

<sup>10</sup> RCW 9A.20.021(1)(c) "Unless a different maximum sentence ... is specially established by statute ... no person convicted of a classified felony shall be punished by confinement .... exceeding the following: (c) For a class C felony, by confinement in a state correctional institution for five years...."

46.61.502(6)(a). A conviction for RCW 46.61.500 (Reckless Driving) is a prior offense "if the conviction is the result of a charge ... originally filed as a violation of RCW 46.61.502 [DUI]." RCW 46.61.5055(14)(a)(v). Due process requires the State to make a preliminary showing such a conviction involved the use of intoxicating liquor or drugs for it to qualify as an admissible prior offense. See *Greene*, 154 Wn.2d at 728; *Chambers*, 157 Wn. App. 481; see also *Miller*, 156 Wn.2d at 31. "Proof of the existence of the prior offenses ... is an essential element ... the State must establish beyond a reasonable doubt." *Chambers*, 157 Wn. App. at 475 (citing *State v. Williams*, 162 Wn.2d 177, 183, 170 P.3d 30 (2007); *State v. Castle*, 156 Wn. App. 539, 542, 234 P.3d 260 (2010)).

- a. The court properly decided the legal question of whether defendant's reckless driving conviction qualified as a prior offense under RCW 46.61.5055(14)(a)(v).

"[T]he question of whether a prior offense meets the statutory definition [under RCW 46.61.5055(14)(a)(v)] is a threshold question of law to be decided by the court ...." *Chambers*, 157 Wn. App. at 467, 477 (citing e.g., *Miller*, 156 Wn.2d at 31); *State v. Boss*, 167 Wn.2d 710, 718-19, 223 P.3d 506 (2009); *State v. Gray*, 134 Wn. App. 547, 549-50, 138 P.3d 1123 (2006); *State v. Carmen*, 118 Wn. App. 655, 77 P.3d 368 (2003). Due process requires a preliminary showing the offense involved

the use of intoxicating liquor or drugs for it to qualify as a prior offense. See **Greene**, 154 Wn.2d at 728; **Chambers**, 157 Wn. App. 481; see also **Miller**, 156 Wn.2d at 31. Prior offenses that do not qualify are not admissible to prove felony DUI. *Id.* (citing **Carmen**, 118 Wn. App. at 644). Appellate courts review issues of statutory interpretation, alleged errors of law, and alleged due process violations *de novo*. **In re Detention of Fair**, 167 Wn.2d 357, 362, 219 P.3d 89 (2009); **State v. R.G.P.**, 175 Wn. App. 131, 136, 302 P.3d 885 (2013)).

Judge McCarthy acted within his authority when he made the threshold determination of whether defendant's reckless driving conviction qualified for admissibility as a prior offense under RCW 46.61.5055(14)(a)(v). 1RP 11-12; CP 36, 146.<sup>11</sup> Defendant erroneously claims the gate keeping reserved to the court by that statute violates the Sixth and Fourteenth Amendment under **Blakely** when alcohol or drug involvement was not an element of a conviction admitted as a prior offense. The **Blakely** issue defendant raises is illusory because the involvement of intoxicating liquor or drugs is not an offense element or penalty-enhancing fact to which **Blakely** applies.

The pertinent reckless driving conviction met the statutory definition of a "prior offense" because it was originally charged as a DUI.

Defendant's jury decided the *existence* of that prior offense beyond a reasonable doubt as *Blakely* requires. CP 86, 88, 93, 102, 105. *Blakely* is not implicated by the trial court's pretrial ruling that the conviction legally qualified for consideration as a prior offense due to the involvement of alcohol or drugs because "[t]he statutory definition of felony DUI does not require the State to allege the specific details of the prior DUI offenses [like the involvement of alcohol or drugs] as an essential element of the crime." *State v. Cochrane*, 160 Wn. App. 18, 25, 253 P.3d 95 (2011); *Chambers*, 157 Wn. App. at 481.

Defendant's assignment of error confuses preliminary fact finding under ER 104 with a court's determination of an offense element or penalty enhancing fact. The alleged *Blakely* violation is predicated on defendant's misapprehension that *Greene* transformed the involvement of intoxicating liquor or drugs into an element of felony DUI governed by *Blakely*. The due process problem presented in *Greene* was the ability of a conviction that did not contain alcohol or drug use as an element to qualify as a prior offense based on nothing more than the inference of alcohol or drug involvement derived from an unproven charging allegation of DUI. 154 Wn.2d 727-28. *Greene* remedied the problem by conditioning a

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<sup>11</sup> Admitted as Ex. 6, but described as Ex. 2 during motions in limine. See 2RP 17.

conviction's qualifying relevance<sup>12</sup> for admissibility as a prior offense on a showing it involved intoxicating liquor or drugs. *See* 154 Wn.2d 727-28; *Chambers*, 157 Wn. App. 481; *see also Miller*, 156 Wn.2d at 31; *Boss*, 167 Wn.2d 710; *Cochrane*, 160 Wn. App. 25; *City of Yakima v. Skov*, 129 Wn. App. 91, 93, 118 P.3d 366 (2005)(citing *Bremerton v. Tucker*, 126 Wn. App. 26, 30, 103 P.3d 1285 (2005); *City of Richland v. Michel*, 89 Wn. App. 764, 770-72, 950 P.2d 10 (1998); *see also State v. Rupe*, 101 Wn.2d 664, 708, 683 P.2d 571 (1984) (penalty based on irrelevant-inadmissible evidence violates due process). *Greene* did not make the involvement of those substances a nonstatutory element of felony DUI that must be proved to a jury beyond a reasonable doubt. *Id.* at 727; *see also Miller*, 156 Wn.2d at 28. It held the statute was constitutional as enacted. 154 Wn.2d 727. So *Blakely* does not apply to the challenged ruling.

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<sup>12</sup> Relevant evidence is generally admissible. *See* ER 402. Evidence is relevant if it has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. The threshold to admit relevant evidence is very low; even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Trial court decisions on the admissibility of evidence are reviewed for an abuse of discretion. *State v. Dobbs*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2014 WL 980102) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). The law does not distinguish circumstantial evidence from direct evidence *See State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A trial court only abuses its discretion when its decisions are manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

- b. Judge McCarthy did not abuse his discretion when he ruled the challenged conviction qualified as a prior offense.

"A trial judge has great latitude in determining ... whether ... evidence should be admitted." *State v. Burgess*, 43 Wn. App. 253, 266, 716 P.2d 948 (1986). "A trial judge's decision [to admit evidence] should be reversed only if 'no reasonable person would have taken the view adopted by the ... court.'" *Id.* (quoting *State v. Jones*, 26 Wn.App. 551, 553, 614 P.2d 190 (1980)).

The prior offense element of felony DUI may be proved in part by a conviction for reckless driving if it was originally filed as a DUI. RCW 46.61.602(6)(a), .5055(14)(a)(v). Due process requires a preliminary showing that such a conviction involved the use of intoxicating liquor or drugs before it can be admitted as proof of a prior offense. See *Greene*, 154 Wn.2d at 728; *Chambers*, 157 Wn. App. 481; see also *Miller*, 156 Wn.2d at 31. "Preliminary questions of fact concerning ... the admissibility of evidence shall be determined by the court... In making its determination it is not bound by the rules of evidence except those with respect to privileges." ER 104; see also ER 1101(1), (3); *Miller*, 156 Wn.2d at 31.<sup>13</sup>

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<sup>13</sup> The admissibility of evidence often turns on a court's preliminary findings of fact. See e.g., ER 609 (impeachment by conviction); ER 702 (expert qualification); 801(d)(2) (party-opponent admissions); 803-4 (hearsay exceptions); CrR 3.5 (confession procedure); CrR 3.6 (suppression hearing).

A defendant's jury trial right under the Sixth Amendment is not infringed by a court's ER 104 ruling on a preliminary question of fact. *See e.g., State v. Fortun-Cebada*, 158 Wn. App. 158, 172-73, 241 P.3d 800 (2010); *Chambers*, 157 Wn. App. at 467.

The trial court properly denied defendant's motion to exclude the reckless driving conviction. Exhibit 6 is a self-authenticating<sup>14</sup> certified court record that established the conviction was originally filed as a DUI; thereby satisfying RCW 46.61.5055(14)(a)(v)'s definitional requirement. CP 36, 145, Ex.6.

Exhibit 6 was also admitted in compliance with the due process requirement announced in *Greene* for it established the conviction involved the use of intoxicating liquor through reliable evidence<sup>15</sup> that was properly considered by the court under ER 104. CP 146, Ex.6. Page 66 records the court's probable cause finding on the originally charged DUI. Ex.6.<sup>16</sup> Page 68 documents defendant's motion to suppress the underlying evidence of his breath or blood alcohol concentration ["BAC"] and the continuance that facilitated his treatment. *Id.* Page 70 enumerates the DUI

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<sup>14</sup> ER 902(d).

<sup>15</sup> The record established that the Chelan District Court no longer possessed the judgment and sentence records and the Chelan conviction was corroborated at trial through the certified copy of defendant's driving record as well as the testimony of DOL custodian Templeton. 4RP 45, 48-49, 55, 59-62, 82-90; CP 146, Ex.9. *State v. Chandler*, 158 Wn. App. 1, 5-6, 240 P.3d 159 (2010).

<sup>16</sup> References to Exhibit 6 will include citation to the page number that appears in the bottom right corner.

sentencing conditions imposed pursuant to defendant's plea to the amended reckless driving offense. *Id.* The court required defendant to obtain an alcohol assessment and install a DUI ignition interlock device while prohibiting him from using alcohol or drugs, frequenting alcohol establishments, or committing alcohol or drug offenses. *Id.* Page 72 documents defendant's compliance with DUI electronic home monitoring and attendance at a DUI victim panel. *Id.* Page 73 documents his completion of an alcohol assessment and Page 75 reports his compliance with the alcohol conditions. *Id.*

The inferences of alcohol involvement reasonably drawn from that evidence overcome **Greene's** due process threshold because they provide a reliable factual basis for finding the reckless driving conviction qualified as a prior offense beyond the unproven allegation of the underlying DUI. See **Chandler**, 158 Wn. App. at 7; **Greene**. See 154 Wn.2d 727; **Miller**, 156 Wn.2d at 31; **Chandler**, 158 Wn. App. at 7. It cannot be reasonably maintained a court would abuse its discretion<sup>17</sup> by qualifying the challenged conviction as a prior offense based on the evidence of alcohol involvement in Exhibit 6. See **State v. Dobbs**, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d

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<sup>17</sup> **State v. Cervantes**, 169 Wn. App. 428, 434, 282 P.3d 98 (2012) (a trial court's decision may be affirmed on any basis, regardless of whether that basis was considered or relied on by the trial court) (citing RAP 2.5(a)).

\_\_\_ (2014 WL 980102) (A trial court only abuses its discretion when its decisions are manifestly unreasonable or based upon untenable grounds or reasons). Citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *Greene*, 154 Wn.2d at 728;

Defendant's argument that the facts contained in Exhibit 6 are insufficient to satisfy due process follows from his misapplication of the reasonable doubt standard to the ER 104 determination of the conviction's qualification under RCW 46.61.5055(14)(a). Defendant also wrongfully analogizes his case to *United States v. Descamps*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2276, 2282-83, 186 L. Ed. 2d 438 (2013). *Descamps* limited the information federal sentencing courts can consider when deciding the existence of prior convictions that increase punishment under the Armed Career Criminal Act (ACCA) 18 U.S.C. § 924(e). Defendant's reliance on that case is misplaced because the facts used to elevate his DUI to a felony were decided by a jury in accordance with *Blakely*. CP 102 (Instruction No. 11, "To convict...."), 100 (Instruction No. 9, "A 'prior offense' means ...."), 86 (verdict). The type of judicial fact finding *Decamps* addressed never occurred in defendant's case.

- c. The trial court did not error when it instructed the jury on the definition of a prior DUI offense.

Appellate courts review a trial court's refusal to give a proposed jury instruction for an abuse of discretion. *State v. Picard*, 90, Wn. App. 890, 902, 954 P.2d 336 (1998). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Smith*, 124 Wn. App. 417, 428, 102 P.3d 158 (2004). The trial court may refuse to give a party's proposed instruction if it misstates the law or is collateral to the instructions given; however, it is reversible error to withhold a proposed instruction if it is an accurate statement of law supported by the evidence. See *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 546 (1997); *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997); *State v. Rice*, 110 Wn.2d 577, 603, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910 (1989), *cert. denied*, 523 U.S. 1007 (1998); *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011).

The challenged "prior offense" definition provided in relevant part:

"A 'prior offense' means any of the following: .... (3) A conviction for a violation of RCW... 46.61.500 (Reckless Driving) ... if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 (Driving Under the Influence)...."

CP 100 (Instruction No. 9). Defendant's rejected definitional instruction added: "and the State has proven beyond a reasonable doubt that the prior incident was alcohol ... related." CP 77.

The trial court correctly refused to give defendant's version of instruction No. 9 because it wrongly added the predicate fact of alcohol involvement as an element of felony DUI when it has not been enumerated as an element by statute or read into the statute as an element by the courts. *See* RCW 46.61.502, .5055(14); **Greene**, 154 Wn.2d at 728; **Chambers**, 157 Wn. App. at 467; **Cochrane**, 160 Wn. App. 25. Whereas the court's instruction accurately stated the applicable law. *See* RCW 46.61.5055(14)(a). Defendant's conviction should be affirmed.

4. DEFENDANT IS INCAPABLE OF PROVING A  
CONFRONTATION CLAUSE VIOLATION  
BECAUSE HE RECEIVED THE  
CONSTITUTIONALLY REQUIRED  
OPPORTUNITY TO CROSS-EXAMINE THE  
STATE'S WITNESSES AT TRIAL.

The Sixth Amendment's confrontation clause confers upon the accused the right to be confronted with the witnesses against him. **State v. Jasper**, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (*citing* U.S. Const. amend. VI). "As reflected in the constitutional text, the right applies to witnesses against the accused in other words, those who 'bear testimony.'...'Testimony,' in turn is typically '[a] solemn declaration or

affirmation made for the purpose of establishing some fact." *Id.* (citing ***Crawford v. Washington***, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). "In ***Crawford***, the United States Supreme Court announced the rule that testimonial statements may not be introduced into evidence unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness." *Id.* (citing 541 U.S. at 68). "The ***Crawford*** Court noted, however, that certain statements 'by their very nature [are] not testimonial—for example, business records....'" *Id.* (citing 541 U.S. at 56).

Certified driving records have long been held admissible as non-testimonial business records. ***Jasper***, 174 Wn.2d at 110-13 (overruling ***State v. Kirkpatrick***, 160 Wn.2d 873, 161 P.3d 990 (2007) and ***State v. Kronich***, 160 Wn.2d 893, 161 P.3d 982 (2007) pursuant to ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) to the extent they treated a clerk's certified interpretation of a driving record as non-testimonial hearsay). The presence of a clerk's authenticating certificate does not transform an otherwise admissible business record into testimonial hearsay. ***Jasper***, 174 Wn.2d at 112 (citing ***Melendez-Diaz***, 557 U.S. at 322, 2538).

Appellate courts review alleged confrontation clause violations *de novo*. ***Jasper***, 174 Wn.2d at 108.

- a. Defendant did not preserve a confrontation right challenge to Trooper Roberts' testimony about the records check that revealed defendant's license was revoked.

“A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.” *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). And a defendant always has the burden of raising a confrontation clause objection, which is waived if untimely made. *State v. Lui*, 179 Wn.2d 457, 527, 315 P.3d 493 (2014) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); *State v. Schroeder*, 164 Wn. App. 164, 167-68, 262 P.3d 1237 (2011)). Hearsay objections are insufficient to preserve an objection based on the confrontation clause since the presence of admissible or inadmissible hearsay does not determine whether the confrontation clause was violated. See *State v. Heib*, 107 Wn.2d 97, 105-06, 727 P.2d 239 (1986) (citing *California v. Green*, 399 U.S. 149, 155-56, 90 S. Ct. 1930, 1933-34, 26 L. Ed. 2d 489 (1970); *State v. Boast*, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976)).

During the State's direct examination Trooper Roberts provided an overview of the investigation that ended in defendant's DUI arrest. 2RP 87-99, 108-10, 113-120; 4RP 14-21. The challenged testimony was first

elicited after Roberts described his recovery of a beer can and driver's license from defendant's vehicle. 2RP 98.

**State:** "Once you got the driver's license ... you did a records check. What were the results of doing the records check?"

**Defendant:** "Objection, hearsay."

**Court:** "Overrule the objection."

2RP 99.

The State returned to the question after a brief recess:

**State:** "[W]e were talking about the part of your investigation when you called into dispatch to do a records check. When you called in to do the records check on the information that Mr. Mullen provided and specifically his driver's license and driver's test, what information did you receive back with regards to Mr. Mullen's driver's license status?"

**Defendant:** "Objection; hearsay - - or I'm sorry, hearsay, your Honor. It also mischaracterizes the witness's testimony earlier about the source of information."

**Court:** "I'll overrule the objection; continue. " ...

**Roberts:** "His driver's license was in a revoked status, revoked in the second degree."

**State:** "All right. Thank you. And I understand from your earlier testimony that you did look at Mr. Mullen's driver's license."

**Roberts:** "Yes, sir." ...

4RP 14-15.

Defendant interposed two *hearsay* objections when Roberts testified about the results of the records check. 2RP 99; 4RP 14. The right

to challenge that testimony as a confrontation clause violation was waived when he failed to object on that basis below. *See Id.*

- b. The challenged testimony was non-testimonial *res gestae* of Trooper Roberts' DUI investigation that did not infringe defendant's right to confrontation.

Statements that fall within the *res gestae* exception to the hearsay rule do not implicate the right to confrontation. *See State v. Athan*, 160 Wn.2d 354, 386, 158 P.3d 27 (2007) (citing *United States v. Cromer*, 389 F.3d 662, 675-76 (6th Cir. 2004); *State v. Mason*, 160 Wn.2d 910, 921-923, 162 P.3d 396 (2007); *Crawford*, 541 U.S. at 59 n.9 ("The Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *State v. O'Cain*, 169 Wn. App. 228, 255-58, 279 P.3d 926 (2012) (citing *State v. Pugh*, 167 Wn.2d 825, 836, 225 P.3d 892 (2009)). *Res gestae* statements are background or part of an event; they are not a narration of facts offered for their truth, in other words they are not testimonial. *See Id.*; *State v. Labbee*, 134 Wn.2d 55, 60-61, 234 P. 1049 (1925).

Trooper Roberts' challenged testimony relayed non-testimonial *res gestae* of his DUI investigation. It explained an event in the investigation to give the jury a comprehensive understanding of what occurred, which was relevant to the jury's evaluation of Roberts' work. *See Athan*, 160

Wn.2d at 386; *Mason*, 160 Wn.2d at 921-923, *Davis v. Washington*, 547 U.S. 813, 827, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *Pugh*, 167 Wn.2d at 836; *Labbee*, 134 Wn.2d at 60-61, *State v. Hurtado*, 173 Wn. App. 592, 597-98, 294 P.3d 838 (2013). The dispatch response was non-testimonial as it was sent to a Trooper in the field to facilitate an ongoing DUI investigation; it was not provided to Roberts to establish the fact of defendant's license revocation at trial. *Id.*; see also *Moen v. Chestnut*, 9 Wn.2d 93, 108, 113 P.2d 1030 (1941). Defendant's right to confrontation was perfected when he was given the opportunity to cross-examine Roberts about his testimony. 4RP 16-19.

Even if a confrontation problem adhered to the challenge testimony, it was either cured, or rendered harmless, when the record documenting defendant's driving history was admitted through DOL custodian Templeton and Templeton's testimony was subjected to cross examination. 4RP 42-9, 55-63-92. See *Eslaminia v. White*, 136 F.3d. 1234, 1237 (9th Cir. 1998) (jury's exposure to adversarially-tested facts in evidence does not violate the right to confrontation); *Jasper*, 174 Wn.2d at 109; *State v. Lui*, 179 Wn.2d 457, 495, 315 P.3d 493(2014) (harmless error when untainted evidence overwhelming leads to a finding of guilt).

- c. Defendant's confrontation right was not violated through the admission of his certified driving record and reckless driving conviction.

Certified driving records are non-testimonial business records of a government entity that may be authenticated by affidavit and admitted into evidence without violating the confrontation clause despite a defendant's inability to cross-examine the certifying officer who prepared them. *Jasper*, 174 Wn.2d 112-13 (citing *Melendez-Diaz*, 557 U.S. at 322, 2538).

Defendant erroneously conflates non-testimonial public business records certified as authentic by an authorized custodian with certified interpretations of data contained in a public record admitted in lieu of live testimony without giving the accused an opportunity to cross-examine its author. By doing so he advances an argument, which if accepted, would eliminate the business record exception to the confrontation clause contrary to controlling federal and state authority. *Lui*, 179 Wn.2d at 481-82, 488, 493; *Jasper*, 174 Wn.2d 112-13, 115 (citing *Melendez-Diaz*, 557 U.S. at 322, 2538).

Defendant's driving record did not present the confrontation problem that occurs when an analyst's findings are admitted at trial without the analyst being subject to cross-examination. *See* Ex.9. This is because its certification did not "go beyond mere authentication, of [an]

otherwise admissible public recor[d] ...[by] furnishing as evidence for trial ... [the clerk's] interpretation of what the record contains or shows, [and] certify to its substance and effect." See *Jasper*, 174 Wn.2d at 101, 115. It is therefore constitutionally distinguishable from the certificates disapproved of in *Jasper*. 174 Wn.2d 100-01, 109 (citing *Kirkpatrick*, 160 Wn.2d at 878; *Kronich*, 160 Wn.2d at 898).

*Lui* clarifies the conceptual delineation between the non-testimonial act of a business record's communication of raw data (like the fact of a prior offense) and the testimonial act of communicating an interpretation of that data (such as expressing an opinion about the legal impact of a prior offense on one's license to drive). See 179 Wn.2d at 481, 486-88, 493 (citing *Melendez-Diaz*, 557 U.S. at 311; *Bullcoming v. New Mexico*, \_\_ U.S. \_\_, 131 S. Ct. 2705, 2713, 180 L. Ed. 2d 610 (2011)). Challenged Exhibit No. 9 falls into former category because it merely contains an objective record of defendant's prior incidents. CP 146, Ex.9. The same is true of the admitted conviction data contained in Exhibit No. 6. CP 145, Ex.6; see also *Chandler*, 158 Wn. App. at 7-8. The interpretation of that data came through DOL Templeton's in-court testimony, which was subject to cross examination as the confrontation clause requires. 4RP 63-79, 91-2.

Any lingering confrontation problem adhering to Exhibit 9 was cured or rendered harmless when DOL Templeton testified from his personal knowledge of defendant's driving record and that testimony was subjected to cross examination. 4RP 52, 55. Thereafter the challenged record and Trooper Roberts' challenged testimony transformed into a reiteration of adversarially-tested facts in evidence. 4RP 63-79, 91-2; *see Jasper*, 174 Wn.2d at 109; *Lui*, 179 Wn.2d at 495; *White*, 136 F.3d. at 1237. Exhibit No. 6 was similarly cleansed of any confrontation clause violations when the court excluded its alleged testimonial content through a carefully-crafted limiting instruction:

"Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Plaintiff's Exhibits 4, 5, 6, 8. These Exhibits may be considered by you only for the purpose of determining the existence of a judgment in those cases. You may not consider them for any other purpose. **You are not to consider any other statements found within the Exhibits other than the existence of a judgment.** Any discussion of the evidence during your deliberations must be consistent with this limitation."

CP 100 (Instruction No. 10) (emphasis added). The State reminded the jury of that limitation in summation. 4RP 127-28. And it is presumed the jury followed its instruction. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Defendant failed to prove a confrontation clause violation.

5. DEFENDANT FAILED TO PROVE THE STATE'S ACCURATE CHARACTERIZATION OF THE REASONABLE DOUBT STANDARD IN REBUTTAL WAS FLAGRANT AND ILL-INTENTIONED MISCONDUCT THAT PREJUDICED HIS CASE.

A defendant bears the burden of establishing both the impropriety of the prosecutor's argument and its prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); see also *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Challenged "arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); see also *State v. Warren*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). If the prosecutor's argument was improper and the defendant made a proper objection, appellate courts consider whether there was a substantial likelihood that the comment affected the jury's verdict. *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). If the defendant failed to make a proper objection, defendant must prove

the prosecutor's argument was so flagrant and ill-intentioned that the resulting prejudice could not have been cured by a proper instruction. *Id.*

Remarks of a prosecutor, even if improper, are not grounds for reversal if they are invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. *Russell*, 125 Wn.2d at 86 (citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)).

Defendant's jury was properly instructed on the presumption of innocence and that the State carried the burden to prove each offense beyond a reasonable doubt through the court's opening instruction, reasonable doubt instruction (Instruction No. 2) and instructions on the elements (Instruction No. 11 and No. 14). 2RP 77-79; 3RP 6; 4RP 124; CP 93, 102, 105. The prosecutor opened his closing remarks by acknowledging the State's burden to prove Count I. 4RP 125. He then recalled the jury to how that offense had been proved by the evidence. *Id.* at 125-30. As the argument progressed to Count II, the prosecutor again acknowledged the State's burden and explained how that offense had been proved through the testimony and admitted exhibits. *Id.* at 131-132.

Defendant's closing argument initially cited the reasonable doubt standard then subtly shifted away from "reasonable doubt" by arguing

defendant is entitled to the benefit of "the doubt." 4RP 133. He immediately transitioned into inflammatory argument from a purported news article about people allegedly incarcerated based on mistaken identification. *Id.* at 133. An objection to argument from facts outside the record was sustained. *Id.* Defendant nevertheless continued to argue unidentified "[c]ritics have indicated this is bureaucracy behind the times; our law requires something more from the Government..." *Id.* Defendant then improperly equated the State of Washington and its DUI investigation to the federal government and its "ability to secretly watch what we're all searching for on Google." 4RP 135. Another objection to argument from facts not in evidence was sustained. *Id.*

Once defendant concluded, the court informed the jury the State was permitted to respond "[s]ince the State has the burden of proof." *Id.* 139. The prosecutor first responded to defendant's argument by directing the jury to Instruction No. 1's admonition "that the lawyers' statements are not evidence." *Id.* at 140. He then addressed defendant's improper attempt to link frustrations the jury might have with the national government's internet surveillance activities to the State of Washington's felony DUI case against defendant. *Id.* 142-143. The prosecutor concluded that line of argument by reiterating "[t]he lawyers' statements aren't evidence" and that "[t]he State met its burden." *Id.* at 143-144. And repeated the refrain:

"Lawyers' statements aren't evidence. The State met its burden." *Id.* at 145-56. After reminding the jury that his comments were intended to "rebu[t]" defendant's argument, the prosecutor made the challenged remark:

"Counsel stated benefit of the doubt to Mr. Mullen. It's reasonable doubt. It's not benefit of the doubt. You are to apply the law and the instructions as given to you. A reasonable doubt, as it states in the instructions, is a doubt for which a reason exists. I submit to you that you can believe in the abiding truth of the charges based of the evidence...."

4RP 146. Defendant did not object when that argument was made. *Id.* The prosecutor concluded by "respectfully request[ing] [the jury] to apply the law that's given to [it] in th[e] instructions to the facts...." 4RP 149.

Defendant made a motion for mistrial during which he inaccurately stated: "counsel for the State said, quite clearly, reasonable doubt does not mean the defendant gets the benefit of the doubt; and that's been found to be clear prosecutorial misconduct." *Id.* at 150-51. In denying the motion, the court noted that the jury had been properly instructed and explicitly recognized that the State was entitled to rebut defendant's argument. *Id.* at 151. Defendant does not assign error to that ruling.

The prosecutor subsequently expressed concern that he made argument disapproved by *State v. Warren* when "[he] used benefit of the doubt in the same sentence as reasonable doubt...." 4RP 156. He opined an

additional an instruction on the presumption of innocence or reasonable doubt might be helpful; however, the court did not perceive an additional instruction to be necessary since the jurors were properly instructed on that law and were several times reminded to decide the case in accordance with their instructions. *Id.*

- a. Defendant unfairly compares the challenged rebuttal to the misconduct at issue in *Warren*.

*Warren* held: "A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principal that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise." 165 Wn.2d at 26-27 (emphasis added). The Court warned "[t]he presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." *Id.* at 26 (emphasis added).

The reverse is also true. Just convictions for violations of the community's criminal law may be made impossible if the State's burden of proof is defined in a way that requires the jury to give a defendant the benefit of *any doubt, however unreasonable*. The prosecutor fairly

interpreted defendant as advocating such a standard when he argued reasonable doubt in a way that divorced "doubt" from the qualifying condition that it be "reasonable." 4RP 133. The result of that separation wrongly suggested the State's case could not be proved if the jury harbored any doubt, no matter how irrationality grounded in passion or prejudice it may be.

That reformulation of the burden easily served defendant's discernable effort to emotionally bias the jury against the State of Washington's DUI case by associating it in the jury's mind with the federal government's criticized surveillance of private internet activities and convictions wrongfully obtained in other states. 4RP 133, 135. Those extraneous events were irrelevant to defendant's case and beyond the evidence adduced at his trial. 4RP 133, 135. The only rational, albeit impermissible, purpose in arguing them to the jury was to inflame its passion and prejudice in an effort to achieve an emotionally driven acquittal under defendant's *any doubt* standard of proof.

The challenged rebuttal manifestly endeavored to return the jury's focus to the evidence and the law given by the court. *See e.g.*, 4RP 140, 146, 149. Reconnecting the constitutionally sanctioned qualifier "reasonable" to the threshold concept of "doubt" was part of that effort as well as consistent with the court's reasonable doubt instruction and the

holding in *Warren*. 4RP 146; 165 Wn.2d at 26-27; 165 Wn.2d at 26-27 ("A defendant is entitled to the benefit of a reasonable doubt... the defendant is entitled to the benefit of any reasonable doubt"). Fairly construed in its proper context the challenged remark accurately communicated: defendant is to receive the benefit of any reasonable doubt, not any doubt, however unreasonable.

Recalling a jury to the reasonable doubt standard is highly distinguishable from the misconduct presented in *Warren* where the prosecutor argued "the defendant did not enjoy the benefit of any reasonable doubt." 165 Wn.2d at 26 (emphasis added). Defendant unfairly characterized the prosecutor's remark as substantively identical to that improper argument: "counsel for the State said, quite clearly, reasonable doubt does not mean the defendant gets the benefit of the doubt; and that's been found to be clear prosecutorial misconduct." *Id.* at 150-51 (emphasis added). The prosecutor's conscientiously expressed concern about the appropriateness of his rebuttal likely betrays a mistaken reliance on defendant's self serving misrepresentation of what was actually said.

- b. The challenged rebuttal can be most critically described as an imprecise reminder of the reasonable doubt standard far removed from a rational definition of flagrant and ill-intentioned misconduct.
  - i. **The challenged rebuttal was not flagrant.**

Improper argument is flagrant when it communicates a "remarkable misstatement of the law" in that it expresses an obvious, extremely, flauntingly, or purposely conspicuous error. *See State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (*citing* Webster's Third New International Dictionary 862-63 (2002)).

The prosecutor's legitimate attempt to respond to defendant's inflammatory rhetoric by recalling the jury to the reasonable doubt standard was not a remarkable misstatement of law that expressed an obvious, extremely, flauntingly, or purposely conspicuous error. And it plainly did not urge the jury to disregard defendant's presumption of innocence.

**ii. The challenged rebuttal was not ill-intentioned.**

"Ill-intentioned" argument evidences a malicious disregard for a defendant's right to due process. *See generally Warren*, 165 Wn.2d at 29; Webster's Third New International Dictionary 1126 (2002).

The prosecutor's attempt to correct a perceived misstatement of the burden of proof by defendant was not ill-intentioned. The prosecutor made the "reasonable" component of the standard express because defendant's argument made it irrelevant, or, at best, ineffectively implied. There is a critical difference between "doubt" and "reasonable doubt" in the context of a criminal trial, where the State is also entitled to due process. Recalling the jury to the standard of proof due process requires cannot be fairly construed as malicious disregard for the presumption of innocence that flows from that right.

**c. Defendant failed to prove prejudice.**

A defendant must prove he was prejudiced by a prosecutor's improper argument to win reversal based on a claim of prosecutorial misconduct. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); *McChristian*, 158 Wn. App. at 400 (*citing Reed*, 102 Wn.2d at 145). Prejudice in this context only occurs "where there is a substantial likelihood the misconduct affected the jury's verdict." *Yates*, 161 Wn.2d at

774. "In analyzing prejudice, [reviewing courts] do not look at comments in isolation, but in the context of the total argument, issues in the case, the evidence, and the instructions given to the jury." *Warren*, 165 Wn.2d at 28 (citing *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). Even improper remarks that touch upon constitutional rights may be cured through proper instructions, which juries are presumed to follow. *Id.* (citing *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001); *State v. Stenson*, 132 Wn.2d 668, 730, 940 P.2d 12 39 (1997)).

The challenged rebuttal was harmless if improper as recalling a jury to the standard of "reasonable doubt" in an argument that urges it to decide the case according its instructions does not pose a substantial likelihood of misdirecting a verdict. In this case the jury was twice instructed and several times reminded the lawyers' remarks are not evidence and that defendant's presumption of innocence could only be overcome if the State proved the truth of each charge beyond a reasonable doubt. 2RP 77-79; 3RP 6; 4RP 124; CP 90 (Instruction No. 1), 92 (Instruction No. 2), 102 (Instruction No. 11), 105 (Instruction No. 14). Persuasive evidence of defendant's guilt was factually uncontroverted. *See e.g.* 2RP 87-96, 108-10, 113-120; 4RP 14-17, 45, 48-49, 55, 59-62, 82-90, 99, 125, 131-32, 140, 146, 149; CP 145-46 (Ex. 3-6, 8-9, 12). And unlike the several instances of improper argument ruled harmless in *Warren*, the


rebuttal's remedial summary of the reasonable doubt standard occurred only once, was less obviously a misstatement of law—if one at all—and was delivered within proper argument from the instructions. Prejudicial error has not been proven.

D. CONCLUSION.

Defendant's constitutionally obtained convictions should be affirmed.

DATED: APRIL 21, 2014

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/21/14   
Date Signature

**PCP\$HMJ**

**April 21, 2014 - 11:21 AM**

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